

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1624
Summary Calendar

SANTIAGO GUTIERREZ,

Plaintiff-Appellant,

VERSUS

INTEX AVIATION SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-2080-H)

(February 19, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Santiago Gutierrez appeals the district court's grant of summary judgment in favor of Intex Aviation Services, Inc. on Gutierrez's claims for defamation, self-publication defamation, intentional infliction of emotional distress, and negligent breach of contract. We find that no genuine issues of material fact exist regarding Gutierrez's claims, and affirm.

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

Intex Aviation Services, Inc. (Intex) services and cleans commercial aircraft on a contract basis. Delta Airlines is Intex's primary customer, and Intex services Delta Airlines (Delta) throughout the United States, including the Dallas/Fort Worth International Airport (DFW). Santiago Gutierrez (Gutierrez) began working for Intex as an Aircraft Cleaner at DFW in November 1990.

In April 1991, a Delta supervisor reported to Gutierrez's supervisor that Gutierrez, while cleaning a Delta aircraft, had emerged from the aircraft's lavatory with his pants down to his thighs, in front of a female Delta employee. Apparently, he had not finished tucking in his shirt and fastening his clothing when he left the lavatory. Gutierrez's supervisor confronted Gutierrez and dismissed him from employment. The next day, Intex's Regional Manager determined that Gutierrez should have been counseled regarding his inappropriate behavior rather than terminated. Gutierrez was reinstated.

A few days later, Gutierrez and two other Intex employees were assigned to work on an aircraft in a distant hangar. An Intex vehicle dropped them off at the beginning of their shift, and was scheduled to return at the end of their shift. At the end of the day, as Gutierrez and his co-workers waited near the hangar to be picked up, a Delta mechanic was dropped off by his wife. Gutierrez approached the mechanic's wife as she left and asked her for a ride. Not knowing Gutierrez, she declined, and

Gutierrez hit the car with his fist and shouted obscenities at her as she drove away. After investigating the incident, Intex terminated Gutierrez.

Gutierrez denied involvement in either incident, and sued Intex for defamation, self-publication defamation, intentional infliction of emotional distress, and negligent breach of contract. Intex filed a Motion for Summary Judgment on all of Gutierrez's claims, and summary judgment was granted by the district court. Gutierrez now appeals.

DISCUSSION

Standard of Review

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine

issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Defamation Claim

Gutierrez claims that Intex defamed him by falsely accusing him of exposing himself to a female Delta employee, and hitting the Delta mechanic's wife's car while yelling obscenities at her. Gutierrez claims Intex made these defamatory remarks to other employees and third persons.

Intex employees are entitled to a qualified privilege for the allegedly defamatory statements made about Gutierrez's termination if the statements were made to persons whose duties involved Gutierrez's employment, and were made without malice. Boze v. Branstetter, 912 F.2d 801, 806 (5th Cir. 1990); Gaines v. CUNA Mutual Ins. Soc'y, 681 F.2d 982, 986 (5th Cir. 1982). Intex presented deposition testimony that only employees with significant interests were informed of the circumstances surrounding Gutierrez's termination. Intex also produced extensive evidence that it believed, in good faith, that Gutierrez had exhibited unacceptable behavior. In contrast, Gutierrez failed to produce any evidence of malice.

Finding no genuine issue of material fact, Intex is entitled to judgment as a matter of law on this claim.

Defamation by Self-Publication

Defamed, wrongfully terminated employees who must repeat the defamatory reasons for their termination to potential future

employers may sue their former employer for defamation by self-publication. First State Bank v. Ake, 606 S.W.2d 696 (Tex. Civ. App. Corpus Christi 1980, writ ref'd n.r.e.). Gutierrez has failed to name any prospective employer to whom he repeated the alleged defamatory reasons for his termination.² Furthermore, he has failed to demonstrate that he was wrongfully terminated. Intex is entitled to judgment as a matter of law on this claim.

Intentional Infliction of Emotional Distress

To prevail on his claim for intentional infliction of emotional distress, Gutierrez must show that (1) Intex acted intentionally or recklessly; (2) Intex's conduct was extreme and outrageous; (3) Intex's actions caused him emotional distress; and (4) the emotional distress was severe. Johnson v. Merrell Dow Pharmaceuticals, Inc., 965 F.2d 31, 33 (5th Cir. 1992).

As previously noted, Intex presented extensive evidence that it acted in good faith when terminating Gutierrez. Additionally, Intex's conduct is within the "realm of the ordinary employment dispute," and therefore is not extreme and outrageous. Wilson v. Monarch Paper Co., 939 F.2d 1138, 1145 (quoting Dean v. Ford Motor Credit Co., 885 F.2d 300, 307 (5th Cir. 1989)). Intex is entitled to summary judgment on this issue.

Negligent Breach of Contract

²Gutierrez testified in his deposition that he told prospective employers that he was terminated, didn't explain why he was terminated, and then gave them his attorney's phone number. He also testified that he thought he had told one prospective employer why he was terminated, but he could not remember who the employer was.

Gutierrez was an at-will employee of Intex, and he therefore had no continued right to employment. He argues that Intex owed him the duty of investigating reports of misconduct, and that Intex breached this duty by investigating negligently. Even if Intex breached its alleged duty to Gutierrez, this does not give rise to a cause of action because under the employee-at-will doctrine, Intex could terminate Gutierrez at any time, with or without a reason. See Conway v. Control Data Corp., 955 F.2d 358, 361 (5th Cir. 1992), cert. denied, 113 S.Ct. 186 (1992). Intex is entitled to summary judgment on this issue.

CONCLUSION

For the foregoing reasons, summary judgment in favor of Intex on all claims is AFFIRMED.